85-140

No. .....

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In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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60 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g.* 403 F.Supp. 1199 (E.D.Va. 1975), which upheld the constitutionality of Virginia's sodomy statute, does not constitute precedent binding upon lower federal courts.

2. Whether the Court of Appeals erred in concluding that Georgia's sodomy statute infringes upon the fundamental rights of homosexuals and in requiring the State of Georgia to demonstrate a compelling state interest in order to support the constitutionality of the statute.

LIST OF PARTIES

Michael Hardwick and John and Mary Doe were the Plaintiffs in the United States District Court for the Northern District of Georgia. Michael J. Bowers, Attorney General of the State of Georgia, Lewis Slaton, District Attorney for Fulton County, Georgia and George Napper, Commissioner of Public Safety for the City of Atlanta were named as Defendants in this action.

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No. .....

In The

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MICHAEL J. BOWERS,
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v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Michael J. Bowers, Attorney General of the State of Georgia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 21, 1985.

OPINION BELOW

The opinion of the Court of Appeals appears at 760 F.2d 1202 (11th Cir. 1985). The opinion of the United States District Court for the Northern District of Georgia was not reported and appears in the Appendix hereto,

along with the opinion of the Court of Appeals and the Court of Appeal's denial of rehearing en banc.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 21, 1985. A timely suggestion for rehearing en banc was filed on May 30, 1985, and denied on June 13, 1985. This petition for certiorari is filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Official Code of Georgia Annotated, Section 16-6-2(a) (1984).

> "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

STATEMENT OF THE CASE

Respondents, Michael Hardwick and John and Mary Doe, filed their complaint in this case on February 14, 1983. Hardwick alleged that he was a practicing homosexual who regularly engages in private homosexual acts, and that he will do so in the future. The Does alleged that

they were lawfully married and had the ambition to engage in activities proscribed by the Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984). The Respondents alleged that the statute was unconstitutional in that it violated their right of privacy under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that it violated due process of law, was unconstitutionally overbroad, and violated their freedom of expression and association. Respondents sought declaratory judgment to this effect.

Each Defendant, including Petitioner Bowers, filed separate motions to dismiss. The District Court, in an order entered by the Honorable Robert H. Hall, dismissed the complaint as to the Does on the basis of their lack of standing. As to Hardwick, the complaint was dismissed on the ground that all of his constitutional claims had been rejected by this Court in *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd* 425 U.S. 90 (1976).

Respondents appealed Judge Hall's decision to the United States Court of Appeals for the Eleventh Circuit and on May 21, 1985, in an opinion authored by the Honorable Frank M. Johnson, Circuit Judge, a majority of the panel found (1) that Hardwick possessed sufficient standing to pursue this action, while the Does lacked standing; (2) that this Court's summary affirmance in *Doe v. Commonwealth's Attorney, supra,* is not binding precedent; and (3) that Georgia's sodomy statute infringes upon Hardwick's fundamental constitutional right of privacy and that the State of Georgia would be required, upon the trial of the case, to establish the existence of a compel-

ling state interest in proscribing consensual homosexual sodomy.

The Honorable Phyllis A. Kravitch, Circuit Judge, filed a separate opinion concurring in part with the majority panel decision, but dissenting from the majority holding that *Doe v. Commonwealth's Attorney* is not binding on the lower federal courts.

On May 30, 1985, a suggestion for rehearing *en banc* was filed on behalf of Petitioner Bowers, and was denied on June 13, 1985.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly With The Decision Of The Court Of Appeals For The District Of Columbia In Dronenburg v. Zech, 741 F. 2d 388, Reh. Denied, 746 F.2d 1579 (D.C.Cir. 1984) By Erroneously Concluding That Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), Sum. Aff'g 403 F.Supp. 1199 (E.D. Va. 1975), Does Not Constitute Binding Precedent.

In *Doe v. Commonwealth's Attorney for the City of Richmond*, 407 F.Supp. 1199 (E.D. Va. 1975) a three judge district court upheld the constitutionality of Virginia's sodomy statute against allegations that the statute violated due process, freedom of expression, and the right of privacy as it related to homosexual conduct.

On appeal, the district court's decision was summarily affirmed by this Court. 425 U.S. 901 (1976). This sum-

mary affirmance formed the basis for Petitioner's motion to dismiss Respondent Hardwick's claims, which was granted by the district court.

The Court of Appeals for the Eleventh Circuit disagreed with the district court's decision and concluded that *Doe* is not binding precedent. While the Court of Appeals recognized that a summary affirmance by the Supreme Court has binding precedential effect, *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975), it decided that *Doe* was not binding since this Court " . . . could have approved the result reached by the district court without addressing the constitutional issues because the Plaintiffs in *Doe* plainly lacked standing to sue." *Hardwick v. Bowers,* 760 F.2d 1202, 1207 (11th Cir. 1985).

Additionally, the Court of Appeals determined that even if Doe's summary affirmance could have been considered a decision on the merits at one time, subsequent doctrinal developments have occurred which would release lower courts from the bonds of *Doe.*

The Court of Appeals concluded that two footnotes in this Court's decision in *Carey v. Population Services International,* 431 U.S. 678 n. 5, n. 17 (1977), and this Court's dismissal of the writ of certiorari in *New York v. Uplinger,* — U.S. —, 104 S.Ct. 2332 (1984) were indications that this court now considers the issue of privacy in the context of homosexual sodomy to be an open question, and fair game for lower court interpretations.

It is urged that the court of appeals has made unwarranted assumptions in its efforts to evade *Doe v. Commonwealth's Attorney.* These assumptions have resulted in a direct conflict with the Court of Appeals for the Dis-

trict of Columbia's decision in *Dronenburg v. Zech,* 741 F.2d 1388, 1392, *reh. denied,* 746 F.2d 1579 (1984). In a unanimous panel opinion authored by Circuit Judge Bork, that court found that the summary affirmance in *Doe v. Commonwealth's Attorney* was binding on the lower courts as a decision on the merits of the issues expressly ruled on by the district court.

As in the case *sub judice* it was urged in *Dronenburg* that *Doe* should be viewed not as an affirmance based upon the constitutionality of Virginia's sodomy statute, but rather upon the plaintiff's alleged lack of standing in the case. The *Dronenburg* court noted, however, that the three-judge district court made its decision on the merits of the constitutional claims, and not on standing, and further noted that the summary affirmance gave no indication that this Court "proceeded upon any other rationale." *Dronenburg,* 741 F.2d 1388, 1392. The court stated:

> Under these circumstances, we doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind.

Id. at 1392.

In addition, the *Dronenburg* opinion examined this Court's previous privacy decisions, ranging from *Griswold v. Connecticut,* 381 U.S. 479 (1965) to *Carey v. Population Services International,* 431 U.S. 678 (1977), and concluded as follows:

> . . . We do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The [Supreme] Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contracep-

> tion, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct.

Id. at pp. 1395-96.

Thus, the District of Columbia Circuit Court was unable to discern doctrinal developments or any indications from this Court that the right of privacy may extend as far as is urged by the Respondents herein or as found by the Eleventh Circuit panel.

As Circuit Judge Kravitch indicated in her dissent from the decision below, this Court has made it clear that summary affirmances are decisions on the merits of a case and the lower courts are bound to follow summary decisions "until such time as the Court informs [them] that [they] are not" *Hicks v. Miranda,* 422 U.S. at 345-346, 95 S.Ct. at 2289 (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir.) *cert. denied,* 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973))." *Hardwick, supra* at 1214. (Kravitch, J., dissenting).

Moreover, Judge Kravitch correctly concluded that even if the perceived "doctrinal developments" of *Carey* and *Uplinger* might indicate a willingness on the part of this Court to reconsider the wisdom of *Doe,* the Court of Appeals is not free to ignore it as binding precedent.

As the Eleventh Circuit stated in *Jaffre v. Wallace,* 705 F.2d 1526 (11th Cir. 1983) *aff'd,* — U.S. —, 105 S.Ct. 2479 (1985):

> Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto v. Davis,* 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982). . . . Justice Rehnquist em-

> phasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be.' *Davis,* 45 U.S. at 375, 102 S.Ct. at 706. *See also, Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.,* [460] U.S. [533, 535] 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 1983). (The Supreme Court in a per curiam decision recently stated: "Needless to say, only this Court may overrule one of its precedents.")

Id. at 1532.

Petitioner maintains that the court below has failed to adhere to its own admonition in this case. In doing so it has created a direct conflict with another Circuit's ruling on the effect of *Doe v. Commonwealth's Attorney* on the present controversy. Its opinion is contrary to the weight of authority, since most federal courts which have had occasion to consider *Doe* have recognized it as binding and as limiting the constitutional right of privacy to heterosexual conduct. *See Beller v. Middendorf,* 632 F.2d 788, 809 (9th Cir. 1980). It is urged that this conflict, and the importance of the issues involved in this matter, warrant review by this Court.

II. The Court Below Erred In Concluding That Georgia's Sodomy Statute Infringes Upon Fundamental Constitutional Rights Of Homosexuals And By Requiring The State To Show A Compelling Interest To Support Its Constitutionality, Thus Raising Significant And Recurring Questions As To The Ability Of The States To Regulate Private Conduct.

In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973) this Court stated:

> Our prior decisions recognizing a right to privacy guaranted by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" [Citations omitted.] This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. [Citations omitted.]

Id. at 65.

It is urged that these traditional zones of protected privacy have not been enlarged in any subsequent decisions of this court. Even *Carey v. Population Services International, supra,* dealt with the individual's right to make decisions to prevent contraception. 431 U.S. at 688.

After recounting these zones of privacy, the lower court in the case *sub judice* perceived an analogy between the zone of marital intimacy and homosexual sodomy stating that "[f]or some, the sexual activity in question here serves the same purpose as the intimacy of marriage." *Hardwick* at 122. The panel also concluded that the same privacy interests identified in *Stanley v. Georgia,* 394 U.S. 557 (1969) (the right to be free from governmental interference with the private possession of obscene material) are implicated in private consensual sodomy.

As noted by Judge Gabrielli in his dissenting opinion in *People v. Onofre,* 51 N.Y.2d 476, 415 N.E.2d 936, *cert. denied* 451 U.S. 987 (1980), decisions relating purely to sexual gratification have been subject to government regulation and proscription throughout the history of western civilization.

> Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of

> rape (43 Aquinas, *Summa Theologiae,* pp. 246-249 [Gilby ed.], 4 *Blackstone's Commentaries,* 215; see, generally, Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L.Rev. 1281, 1292-98). Indeed, as early as 1553 during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various states. . . . [I]t simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clauses of the Fifth and Fourteenth amendments.

Id. at 503-504, 4215 N.E.2d at 949 (Gabrielli, J., dissenting). In contrast, this Court in *Roe v. Wade,* 410 U.S. 113 (1973) in finding a limited right of privacy with respect to abortion decisions, conducted a historical review of ancient attitudes, and the common law and statutory laws of England and America, and concluded that at the time of the adoption of our Constitution, and through a major portion of the 19th Century, " . . . a woman enjoyed a substantially broader right to terminate pregnancy than she does in most states today." 410 U.S. at 140, 93 S.Ct. at 720. No similar right to engage in sodomy existed at the time of the adoption of our Constitution. It is therefore urged that sodomy of any kind, including that which perchance takes place in private, cannot be considered a fundamental right or implicit in the concept of ordered liberty. Such a right is not contemplated by the Constitution. *See generally, Paris Adult Theatre I, supra.*

Members of this Court have indicated that they would not go so far as the lower court has in this case. In *Carey, supra,* Justice White, in his concurring opinion, stated, "I do not regard the opinion, however, as declaring uncon-

stitutional any state law forbidding extra-marital relations." 431 U.S. at 702. Justice Powell, in his concurrence, rejected any view which would subject all state regulation affecting adult sexual relations to the strictest standard of review. "Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard wherever it implicates sexual freedom." 431 U.S. at 705. Justice Rehnquist, in a footnote to his dissent, referred to the fact that the facial constitutionality of sodomy statutes has "definitively" been established, citing *Doe v. Commonwealth's Attorney, supra.* 431 U.S. at 718, n. 2. (Rehnquist, J. dissenting)

Indeed the majority opinion in *Carey,* in footnote 5, expressly denied that it was holding that state laws must meet the compelling state interest test whenever sexual freedom is implicated, but only when they infringe upon an individual's decision to prevent conception or terminate pregnancy. 431 U.S. at 688, n. 5.

Justice Blackmun, in writing for the Court in *Roe v. Wade, supra,* recognized that the right of privacy is not absolute:

> In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). [Other citation omitted.]

This Court in *Paris Adult Theatre I, supra,* made it clear that the states do have the right to make unprovable

assumptions lacking in scientifically certain criteria, in order to protect a social interest in order and morality. "As Chief Justice Warren stated, there is a 'right of the nation and of the states to maintain a decent society. . . .'" *Paris Adult Theatre I v. Slaton,* 413 U.S. at 59-60, quoting *Jacobellis v. Ohio,* 378 U.S. 184, 199 (1964) (Warren, C. J. dissenting). Thus it was held that even though there might be no conclusive proof of a connection between antisocial behavior and obscene material, it was within the power of the General Assembly of Georgia to make that determination. The State of Georgia has made a similar conclusion with respect to sodomy.

Finally, the Court in *Dronenburg v. Zech,* 741 F.2d 1388, *reh. denied,* 746 F.2d 1579 (D.C. Cir. 1984) was unable to find any principle which would apply a right of privacy to homosexual conduct. 741 F.2d at 1395-96.

It is urged that the Eleventh Circuit's opinion purports to create a right of privacy where none has previously existed. It will substantially impede the ability of Georgia and her sister states to legislate in any area which touches upon moral issues. The decision below calls into question numerous statutes proscribing personal, private consensual conduct such as suicide, prostitution, polygamy, adultery, and fornication, *Paris Adult Theatre I v. Slaton, supra,* 413 U.S. at 69, 93 S.Ct. at 2641, n. 15, and those laws prohibiting the private possession and use of illegal drugs, such as marijuana. The decision raises significant questions relating to the relationships of government, the Constitution, state laws and individual actions which substantially impact on the traditional mores of this nation.

CONCLUSION

Petitioner shows that the decision below is erroneous and constitutes a precedent-setting error of exceptional importance. The Court of Appeals for the Eleventh Circuit has failed to follow binding precedent of this Court and has rendered an opinion in direct conflict with that of the Court of Appeals for the District of Columbia. *Dronenburg v. Zech,* 741 F.2d 388, *reh. denied,* 748 F.2d 1579 (D.C.Cir. 1984).

The lower court's opinion purports to create a new right under the federal Constitution which has never been recognized by this Court. In doing so, the lower court's opinion has substantially diminished the ability of the state to enact legislation having as its object the preservation of a decent and moral society. The effects of the opinion, if left to stand, will reach well beyond the issues presented herein. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C83-273A

MICHAEL HARDWICK, et al.,

Plaintiffs,

vs.

MICHAEL BOWERS, et al.,

Defendants.

ORDER

(Filed April 18, 1983)

Plaintiffs, a male homosexual and a married couple, seek a declaratory judgment that Official Code of Georgia Annotated § 16-6-2 is unconstitutional, insofar as it makes consensual sodomy a crime. Plaintiffs allege that the statute violates their constitutional rights of privacy, due process, and freedom of expression and association. Defendants, Michael Bowers, Attorney General of Georgia, and Lewis Slaton, District Attorney of Fulton County, have filed motions to dismiss for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Additionally, it is argued that there is no justiciable controversy as to the married couple, the Does.

The statute in question provides in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .

As to plaintiffs Doe, the court must agree that their allegations do not create a justiciable controversy. The Does allege that they are a married couple who seek to engage in sexual activity proscribed by O.C.G.A. § 16-6-2 in the privacy of their home. Additionally, they allege that they have been chilled and deterred from engaging in the activity by the existence of the statute and the recent arrest of plaintiff Hardwick for sodomy under the statute. Hardwick's case, however, has not been presented to the grand jury, and the District Attorney's Office has stated that it will not be presented unless further evidence develops.

The Does do not allege that they have been threatened with prosecution or that any other married couple has been prosecuted or threatened with prosecution under the statute. Even though plaintiff Hardwick was arrested, he has not been prosecuted. Like the married couple in *Poe v. Ullman,* 367 U.S. 497, 505 (1961), the Does are unable to show that they have sustained or are in immediate danger of sustaining some direct injury as a result of the statute's enforcement. *See also Roe v. Wade,* 410 U.S. 113, 127-29 (1973).

As to plaintiff Hardwick, his arguments are foreclosed by the Supreme Court's affirmance of a three-judge district court decision upholding the constitutionality of the Virginia sodomy statute. *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976). The Virginia statute challenged in that case is quite similar to the Georgia legisla-

tion in question here, and all the constitutional arguments made by Hardwick here were rejected in Doe.

For these reasons, the motions to dismiss are GRANTED.

So ORDERED this 15th day of April, 1983.

/s/ Robert H. Hall
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

JUDGMENT ON DECISION BY THE COURT
FOR THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

Civil Action Docket No. C83-273A

MICHAEL HARDWICK

Plaintiff,

vs.

JOHN DOE, MARY DOE, MICHAEL BOWERS,
Attorney General, LEWIS SLATON, et al

Defendants.

JUDGMENT

This action came on for (hearing) before the court, United States District Judge ROBERT H. HALL presiding. The issues having been duly tried (heard) and a decision having been duly rendered, granting defendants' motions for summary judgment, IT IS ORDERED AND ADJUDGED that the plaintiff, MICHAEL HARDWICK take nothing, that action be dismissed and that the defendants recover their costs of Action———————

Dated at: Atlanta, Georgia
Filed and entered in the
Clerk's office: 4/22/82
BEN H. CARTER, CLERK
By /s/ Danny Brown

Date: April 22, 1983

BEN H. CARTER, CLERK
By /s/ Danny Brown
Deputy Clerk of the Court

APPENDIX "C"

Michael HARDWICK, et al.,

Plaintiffs-Appellants,

vs.

Michael BOWERS, et al.,

Defendants-Appellees.

No. 83-8378.

United States Court of Appeals,
Eleventh Circuit.

May 21, 1985.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The Atlanta Police arrested Michael Hardwick on August 3, 1982, because he had committed the crime of sodomy with a consenting male adult in the bedroom of his own home. Charges were brought as a result of the arrest and after a hearing in the Municipal Court of Atlanta Hardwick was bound over to the Superior Court. At that point the District Attorney's office decided not to present the case to the grand jury unless further evidence developed.

Hardwick then filed this suit asking the federal district court to declare unconstitutional the Georgia statute that

criminalizes sodomy, O.C.G.A. § 16-6-2 (1984).[1] Hardwick alleged in his complaint that he is a practicing homosexual who regularly engages in private homosexual acts and will do so in the future. He was joined in bringing the suit by John and Mary Doe, a married couple acquainted with Hardwick. They claimed that they desired to engage in sexual activity proscribed by the statute but had been "chilled and deterred" by the existence of the statute and the recent arrest of Hardwick.

The complaint named as defendants Michael Bowers, Attorney General of Georgia; Lewis Slaton, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta. All three filed a motion to dismiss for failure to state a claim upon which relief could be granted.

The district court granted the motion. It ruled that the Does did not have standing to bring suit and that Hardwick, although he possessed standing, had no legal claim in light of the Supreme Court's summary affirmance of a three-judge district court in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47

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1. Section 16-6-2 provides as follows:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment of not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

L.Ed.2d 751 (1976), *aff'g*, 403 F.Supp. 1199 (E.D.Va.1975). All three plaintiffs have appealed the dismissal.

I. STANDING

[1, 2] A federal court may not hear a legal claim unless it arises from a genuine case or controversy. A case or controversy requires a plaintiff with a personal stake in the outcome sufficient to assure an adversarial presentation of the case. Hence, a plaintiff must demonstrate that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir.1983).[2]

[3] The State is not currently prosecuting Hardwick or the Does under the sodomy statute. The Does have never been arrested under the statute and Hardwick cannot rely solely on his past arrest to confer upon him standing to challenge the constitutionality of the statute. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). This suit, therefore, presents an

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2. The defendants do not dispute that the enforcement of this statute causes the injury alleged by Hardwick and the Does or that the requested declaratory judgment would likely redress their injuries. *Simon v. Eastern Kentucky Welfare Rights Organzation*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); Nor do they suggest any prudential reasons for this court to refuse to hear the case. See *Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). But see note 3, infra.

anticipatory challenge to the statute. The standing of each of the plaintiffs will depend on whether the threat of prosecution under this statute is real and immediate or "imaginary" and "speculative." *Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974).

A court can estimate the likelihood of prosecution by examining the identity and interests of each of the parties. The interest of the State in enforcing the statute, along with past enforcement patterns, provides one indication; the interest of the plaintiff in engaging in the prohibited activity provides another. *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 818 (5th Cir.1979).[3]

[4] The interest of the State in prosecuting these plaintiffs need not take the form of a specific threat of prosecution against them individually, although such a threat will often suffice to give a plaintiff standing. *Steffel v. Thompson, supra.* A general threat of prosecution against an identifiable group may confer standing in some instances. For instance, in *Lake Carriers' Association v. MacMullan,* 406 U.S. 498, 508, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972), the Court ruled that a group of bulk cargo vessel owners had standing to challenge a state law, about to go into effect, mandating certain sewage dis-

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3. The court in *ISKCON v. Eaves* concluded that the plaintiff's interest in violating the statute determined the Article III component of standing, while the State's enforcement interest bore relevance only to the "prudential" aspect of the standing doctrine. This distinction does not influence our analysis of the standing of these plaintiffs, for we consider standing in both the constitutional and prudential senses.

posal methods for cargo vessels. Even though the State had threatened no particular owner with prosecution under the statute, it announced that it would prosecute violators as soon as the statute became effective.

[5] The past enforcement of the statute against Hardwick is especially significant in measuring the State's intentions of prosecuting him in the future. Hardwick alleges that his arrest resulted from a situation in which he regularly places himself, one that will recur often in the future. As this Court recognized in *Cuidadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 820 (5th Cir.1980), *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981), evidence of past injuries inflicted by the State raises the strong inference that future injuries will appear. A past enforcement effort often will confirm the reasonableness of a plaintiff's subjective fear of prosecution. This is particularly true in Hardwick's case if one accepts as true[4] his allegation that the Atlanta Police enforce the statute in a way that places all practicing homosexuals in imminent danger of arrest.

A second indicator of threatened harm to these plaintiffs come from the nature of their interest in violating the statute. Each of them claims that their normal course of activity will lead them to violate the statute, completely apart from their desire to have it invalidated. Hardwick status as a homosexual adds special credence to his claim.

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4. Because Hardwick appeals from a dismissal for failure to state a claim upon which relief can be granted, the allegations of his complaint must be taken as true. The same holds true for the Does, whose complaint was dismissed for lack of subject matter jurisdiction before the defendants filed any answer.

See International Society for Krishna Consciousness v. Eaves, supra, at 819. While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.

In some cases, the authentic interest of the plaintiff in engaging in the prohibited conduct can establish standing even though the only threat of enforcement by the State comes from the very existence of the statute. The Supreme Court in *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 302-03, 99 S.Ct. 2301, 2310-11, 60 L.Ed.2d 895 (1979), held that a union could challenge a state law prohibiting deceptive advertising relating to farm products because the union planned to sponsor advertising campaigns in the future and the State had not disavowed any intention of enforcing the statute. The risk that the State would detect the inadvertent use of an inaccuracy in an advertisement by the union and would prosecute for that offense was a threat immediate enough to give the union standing. *See also Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (doctor who consulted with pregnant women regarding birth control in violation of law was "one of those against whom these criminal statutes directly operate"); *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (teacher challenging statute prohibiting teaching of evolution). A plaintiff has a stronger claim for standing if, in addition to the authencity of the interest, he or she is best suited to challenege a law. *Atlanta Gas Light Company v. United States Department of Energy,* 666 F.2d 1359, 1364 n. 7 (11th Cir.),

cert. denied, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 78 (1982).

[6] The past arrest of Hardwick, combined with the continuing resolve on the part of the State to enforce the sodomy statute against homosexuals and the authenticity of Hardwick's desire to engage in the proscribed activity in the future, leads us to agree with the district court that Hardwick has standing to bring this lawsuit. The issue of the Does' standing is less straightforward. They have not been arrested or threatened with arrest for sodomy. At first glance, they appear to be in the same position as several of the plaintiffs in *Younger v. Harris,* 401 U.S. 37, 40-42, 91 S.Ct. 746, 748-749, 27 L.Ed.2d 669 (1971), who intervened in a federal suit filed by an acquaintance who had been prosecuted by the state under a criminal syndicalism law. The intervenors, teachers, alleged that the existence of the statute and the prosecution of Harris had "inhibited" their teaching and had left them "uncertain" as to their legal rights. The Court ruled that the intervenors had no standing.

The Does argue that they do not stand in precisely the same position as the intervenors in *Younger* because the defendants in that case brought their appeal after the entry of final judgment in the three-judge district court. The intervenors had been given an opportunity to present evidence of a realistic probability of prosecution apart from their unsupported fears; they had presented no such evidence. The Does, on the other hand, have not had an opportunity to engage in discovery and to present evidence relating to the enforcement of this statute against married couples.

The lack of evidence related to threat of injury should in many cases lead a court to permit discovery and to make factual findings before dismissing a suit for lack of standing. *Cf. Chancery Clerk of Chickasaw County, Mississippi v. Wallace,* 646 F.2d 151, 159 (5th Cir. Unit A 1981); *City of Waco v. Environmental Protection Agency,* 620 F.2d 84 (5th Cir.1980). The Does, however, did not allege in their complaint that they faced a serious risk of prosecution. They stated only that the existence of the statute along with the arrest of Hardwick had "chilled and deterred" them and had "interfered" with decisions regarding their private lives. In resisting the defendants' motion to dismiss for lack of standing, the Does never claimed membership in a group especially likely to be prosecuted. Throughout the proceedings in the district court, including the motion for reconsideration of the judgment, the Does claimed that the existence of the statute, its literal applicability to their situation, and the refusal of the State to disavow any intent to prosecute them combined to give them standing. At no time before this appeal did they request discovery or an evidentiary hearing to determine the likelihood of future prosecution; they filed no affidavit to establish any realistic threat. Under these circumstances, *Younger v. Harris, supra,* controls and we affirm the district court's dismissal of the Does' complaint for lack of standing. *Cf. Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

II. THE EFFECT OF *DOE V. COMMONWEALTH'S ATTORNEY*

In 1975 a three-judge district court in Virginia upheld the constitutionality of that state's sodomy law, *Doe v. Commonwealth's Attorney for City of Richmond,* 403

F.Supp. 1199 (E.D.Va.1975). The plaintiffs, homosexuals who had neither been arrested nor threatened with prosecution, argued that the statute violated their rights to due process, freedom of expression, privacy, and freedom from cruel and unusual punishment. They appealed the adverse decision of the district court to the Supreme Court. The Court summarily affirmed the judgment. 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). The district court in this case dismissed Hardwick's complaint for failure to state a claim upon which relief could be granted, relying exclusively on *Doe*.

A. The Bounds of the Original Holding in *Doe*

[7] A summary affirmance of the Supreme Court has binding precedential effect. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Yet because the Court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court. *Mandel v. Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); *Fusari v. Steinberg,* 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975).

Despite this general admonition, finding the precise limits of a summary affirmance has proven to be no easy task. Courts seeking to identify the issues governed by a summary affirmance should examine the issues necessarily decided in reaching the result as well as the issues mentioned in the jurisdictional statement. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 181-83, 99 S.Ct. 983, 988-89, 59 L.Ed.2d 230 (1979). These two

criteria conflict in this case. The jurisdictional statement in *Doe* presented the question of whether Virginia's sodomy statute violated constitutional rights to privacy, due process, and equal protection under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Yet the Court could have approved of the result reached by the district court without addressing those constitutional issues because the plaintiffs in *Doe* plainly lacked standing to sue.[5] Hence,

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5. The plaintiffs there had not been arrested for violation of the statute, nor did they present any evidence of threatened prosecutions or past prosecutions under the statute. At most, the plaintiffs had a "generalized grievance" regarding the statute and its enforcement that was insufficient to allow a federal court to reach the merits of their claim. Cf. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

The fact that the Supreme Court in *Doe* affirmed a dismissal on the merits below rather than vacating the judgment with instructions to dismiss for lack of subject matter jurisdiction does not demonstrate that the court reached the merits of the case. While an appellate court that finds lack of standing normally will vacate the judgment and remand for dismissal, the Supreme Court has not uniformly followed that course. *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (reversing decision on the merits due to lack of Article III standing); *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (same). Moreover, the Court would be even less likely to vacate the judgment and remand for dismissal when a case presents prudential standing problems which, unlike constitutional standing requirements, do not bear on the very power of the court to hear the case. *Warth v. Seldin*, 422 U.S. 490, 499-501, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975) ("reluctance to exert judicial power" due to prudential standing problems may be overcome by countervailing factors). The facts as described by the district court in *Doe* presented what appeared to be non-

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the constitutional issues presented in *Doe* were issues listed in the jurisdictional statement but not necessary to the disposition of that case.

Several reasons lead us to conclude that the mention of constitutional issues in the jurisdictional statement in *Doe* does not override the clear availability of a narrower ground of decision. To begin with, the Supreme Court has generally referred to the two indicia, necessity to the deci-

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constitutional standing problems. Cf. *Schlesinger v. Reservists Committee to Stop the War, supra; Poe v. Ullman, supra.*

Similar reasoning applies to appellate jurisdiction. The special jurisdictional provisions of 28 U.S.C.A. § 1253 (1966) confer appellate jurisdiction on the Supreme Court only when a three-judge court was properly convened. Therefore the Supreme Court will often dismiss the appeal and vacate the judgment below if the three-judge court dismissed the case due to a plaintiff's lack of constitutional standing. *Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974). However, the Supreme Court has not held that it lacks appellate jurisdiction over an appeal from a dismissal on the merits by a three-judge court where the plaintiff lacks standing. Moreover, a three-judge court may be properly convened even when it could possibly decide the case on non-constitutional grounds. *Alexander v. Fioto,* 430 U.S. 634, 97 S.Ct. 1345, 51 L.Ed.2d 694 (1977); *Philbrook v. Glodgett,* 421 U.S. 707, 712, 95 S.Ct. 1893, 1897, 44 L.Ed.2d 525 (1975). The Supreme Court could therefore affirm a dismissal by a three-judge court if prudential standing problems hindered the court from hearing the merits; dismissal for lack of appellate jurisdiction would not be necessary.

The court in *Poe v. Ullman, supra,* dismissed the appeal rather than affirming the dismissal below because the plaintiffs there appealed from state court pursuant to 28 U.S.C.A. § 1257 (1966). The Supreme Court refused to hear the merits because of prudential considerations binding only on federal courts. Since the state court had not faced the same bar to adjudication on the merits, dismissal of the appeal was the proper disposition.

sion and presentation in the jurisdictional statement, as if both were necessary. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 499, 101 S.Ct. 2882, 2888, 69 L.Ed.2d 800 (1981) (summary affirmance binding as to "precise issues presented *and* necessarily decided") (emphasis supplied); *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 182-83, 99 S.Ct. at 989-90; *Mandel v. Bradley, supra,* 432 U.S. at 176, 97 S.Ct. at 2240; *see also Cherry v. Steiner,* 716 F.2d 687, 690 (9th Cir.1983), *cert. denied,* — U.S. —, 194 S.Ct. 1719, 80 L.Ed.2d 190 (1984). Furthermore, if the jurisdictional statement could expand a summary affirmance beyond the scope of issues necessarily decided, it would give the litigants considerable control over the scope of summary dispositions. While a jurisdictional statement prevents speculation as to what issues the Court actually considered, *see Howell v. Jones,* 516 F.2d 53, 56 (5th Cir. 1975), *cert. denied,* 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 (1976), it is only a tool in determining the ultimate question: the most narrow plausible rationale for the summary decision.

[8, 9] Lower courts may rely upon the jurisdictional statement as an outside limit on the precential scope of a summary decision but Supreme Court precedent does not allow us to consider the jurisdictional statement as both a minimum and a maximum formulation of the issues decided. Where, as in the *Doe* case, the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground. We therefore construe *Doe* as an affirmance based on the plaintiffs' lack of standing and not controlling in this case.

B. Doctrinal Developments after *Doe*

[10] Even if *Doe* had been resolved on the constitutional grounds now asserted by Hardwick[6] the Supreme Court has indicated since that time that the constitutionality of statutes such as the one in question here is not governed by *Doe* but, rather, remains an open question. Since a summary disposition binds lower courts only until the Supreme Court indicates otherwise, *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 St.Ct. 2281, 2289-90, 45 L.Ed.2d 223 (1975), developments subsequent to the *Doe* decision undermine whatever controlling weight it once may have possessed.

[11] Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent. *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984); *Browder v. Gayle*, 142 F.Supp. 707 (M.D.Ala.) (three-judge court), *aff'd per curiam*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956). Even less clear-cut expressions by the Supreme Court can erode an earlier summary disposition because summary actions by the Court do not carry the full precedential weight of a decision announced in a written opinion after consideration of briefs and oral argument. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500, 101 S.Ct. 2882, 2888,

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6. The *Doe* affirmance could not control all of Hardwick's legal claims. He alleges that the Georgia statute violates his First Amendment freedom of association, a claim not addressed by the jurisdictional statement or the district court opinion in *Doe*.

69 L.Ed.2d 800 (1981); *Edelman v. Jordan,* 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974). The Court could suggest that a legal issue once thought to be settled by a summary action should now be treated as an open question, and it could do so without directly mentioning the earlier case. At that point, lower courts could appropriately reach their own conclusions on the merits of the issue. *Lecates v. Justice of the Peace Court No. 4 of Delaware,* 637 F.2d 898 (3d Cir.1980).

At least two actions by the Supreme Court demonstrate that it now considers the constitutional issues purportedly determined in *Doe* to be unsettled. The first indication came in the decision in *Carey v. Population Services,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The Court there held, *inter alia,* that a state could not prevent the sale of non-prescription contraceptives to adults by persons other than licensed pharmacists. Justice Powell stated in a concurring opinion that the majority had employed an unnecessarily broad principle that subjected all state regulation affecting "adult sexual relations" or "personal decisions in matters of sex" to the strictest standard of judicial review. The majority responded in footnote 5 that its holding only applied to state regulation that burdens an individual's right to decide to prevent conception by substantially limiting access to the means of effectuating that decision. It then went on to state the following: "As we observe below, 'the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n. 17, *infra,* and we do not purport to answer that question now" (brackets in original). Footnote 17, although joined only by

a plurality, casts some light on the nature of the "private consensual sexual behavior among adults" referred to in footnote 5 because it cites a law review comment[7] that discusses the possible application of Supreme Court precedent to criminal statutes outlawing private consensual sexual activities, including sodomy. Justice Rehnquist, in a dissenting opinion, criticized the language of footnote 5 because he considered it to be in conflict with *Doe,* which in his view had definitively established the constitutional validity of state prohibitions of certain consensual activities.

The implications of footnote 5 could hardly be clearer. The plain meaning of the phrase "private consensual sexual behavior among adults" encompasses acts of sodomy carried out between consenting adults in private. The identical phrase in footnote 17 is accompanied by a reference to just that sort of activity. The ability of the state to regulate conduct as Georgia has attempted to do, according to the Court in *Carey,* is now an open question. Obviously *Carey* does not provide much guidance as to the proper analysis of the constitutional claims presented in this case; just as obviously, it calls on lower courts to analyze such claims rather than relying on *Doe.*

A second development in the Supreme Court occurred more recently when the Court granted certiorari in *New York v. Uplinger,* —— U.S. ——, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983), and later dismissed the writ as improvidently granted, 104 S.Ct. 2332 (1984). The New York Court of Appeals had ruled in that case that federal constitutional

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7. Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L.Rev. 670, 719-738 (1973).

law invalidated a New York statute prohibiting persons from loitering in a public place for the purpose of engaging or soliciting another person to engage, in "deviate sexual behavior." The decision was premised on an earlier ruling by that court in *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied,* 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845 (1981), where it held that the federal constitution invalidated a state statute criminalizing any act of sodomy between two persons. Hence, the petitioner for writ of certiorari in *Uplinger* urged the Supreme Court to consider the constitutionality of state regulations prohibiting consensual sodomy among adults.

After the Supreme Court received the briefs of the parties and heard oral argument in *Uplinger,* it dismissed the writ of certiorari as improvidently granted. In a per curiam order, the Court stated that the case presented an "inappropriate vehicle" for resolving the "important constitutional issues" raised by the parties. The Court also indicated that the constitutionality of state laws against consensual sodomy was one of the most important of those issues; it explained that several impediments to consideration of the constitutional issues presented in the *Onofre* decision figured heavily in its decision to dismiss the writ. Those impediments included the belated decision of the petitioner not to challenge the *Onofre* decision and the fact that the state court decision in *Uplinger* was subject to varying interpretations, leaving uncertainty as to the precise federal constitutional issue the state court decided.

[12, 13] It is fair to conclude from this order that the Supreme Court was prepared to address the constitutionality of state regulations like Georgia's sodomy sta-

tute but chose to address the issue when presented more directly in another case.[8] While the Court may have meant that it was prepared to reconsider the *Doe* affirmance, which would have remained binding precedent until overruled, such a possibility is unlikely because the Court never referred to *Doe* in the *Uplinger* proceedings or indicated in any way that the underlying constitutional issue was settled, even temporarily.[9] Under these circumstances, we interpret the order as an indication that the constitutional questions presented by Hardwick are still open for consideration by the Supreme Court and by this Court. This order, together with the Court's observation in *Carey*, deprives *Doe v. Commonwealth's Attorney* of whatever controlling weight it once may have had. The district court erred in dismissing Hardwick's claim.

III. CONSTITUTIONAL STANDARDS

[14] Despite the fact that the district court erred in relying on *Doe v. Commonwealth's Attorney*, we still con-

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8. The denial of a petition for writ of certiorari generally has no precedential value. *Hughes Tool Co. v. Transworld Air Lines, Inc.*, 409 U.S. 363, 366 n. 1, 93 S.Ct. 647, 650 n. 1, 34 L.Ed.2d 577 (1973). In this case, however, the Court granted certiorari, considered the briefs, heard oral argument, and dismissed the writ after explaining its reasons. We may draw appropriate inferences from such an order. *See Brown v. Allen*, 344 U.S. 443, 489-97, 73 S.Ct. 397, 437-41, 97 L.Ed. 469 (1953).

9. Contrary to the assertion of the dissent, we do not imply that the Supreme Court intended *Uplinger* to be a vehicle for overruling *Doe*. The dismissal in *Uplinger* suggests only that the court intended to consider the constitutional issue and resolve it one way or the other. Hence, speculation as to the views of the dissenting justices in *Uplinger* regarding the merits of that case does not influence our reading of the per curiam opinion.

front the question of whether the appellees were entitled to dismissal as a matter of law on some other ground. *Smith v. Phillips,* 455 U.S. 209, 215 n. 6, 102 S.Ct. 940, 945 n. 6, 71 L.Ed.2d 78 (1982). In particular, the judgment below could stand if we were to conclude that the statute in question is subject to minimal judicial scrutiny and that the appellants could not under any set of facts prove that the statute is not rationally related to the State's regulatory interest. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Such is not the case here. The Georgia sodomy statute infringes upon the fundamental constitutional rights of Michael Hardwick. On remand, the State must demonstrate a compelling interest in restricting this right and must show that the sodomy statute is a properly restrained method of safeguarding its interests. *Cf. Dike v. School Board of Orange County, Florida,* 650 F.2d 783, 787 (5th Cir. Unit B 1981).

[15] The Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society. These include the decision whether to conceive and bear a child, *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade,* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973); *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), and decisions affecting certain intimate relationships such as marriage, *Zablocki*

v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), and other familial ties, *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Dike v. School Board of Orange County, Florida,* 650 F 2d 783 (5th Cir. Unit B 1981).

While the constitutional source of these limitations of the power of the State has been termed the "right to privacy," it is not limited to conduct that takes place strictly in private. Some personal decisions affect an individual's life so keenly that the right to privacy prohibits state interference even though the decisions could have significant public consequences. For instance, the direction of a child's education will have profound public consequences, yet under the Constitution a parent retains authority to direct his or her child's education. *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Stough v. Crenshaw County Board of Education,* 744 F.2d 1479 (11th Cir.1984). Similarly, a state has an interest in assuring the physical health of its citizens by regulating or forbidding certain medical procedures, but that interest gives way when a woman in the early stages of pregnancy chooses not to have a child. *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Hardwick desires to engage privately in sexual activity with another consenting adult. Although this behavior is not procreative, it does involve important associational interests. The Supreme Court has indicated in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510

(1965), and *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), that the intimate associations protected by the Constitution are not limited to those with a procreative purpose. The Court in *Griswold* struck down a state law prohibiting the use of contraceptives because it unduly interfered with the sanctity of the marriage relationship. One component of that relationship is the decision whether to beget and bear children. *Carey v. Population Services International,* 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). But the marital relationship is also significant because of the unsurpassed opportunity for mutual support and self-expression that it provides. As the *Griswold* Court stated, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes . . . ." 381 U.S. at 486, 85 S.Ct. at 1682, *See also Zablocki v. Redhail,* 434 U.S. 374, 385-86, 98 S.Ct. 673, 680-81, 54 L.Ed.2d 618 (1978) (listing "associational interests" and procreation as separate interests protected by right to marry).

The intimate association protected against state interference does not exist in the marriage relationship alone. In *Eisenstadt v. Baird, supra,* the Supreme Court held that prohibiting the distribution of contraceptives to unmarried persons was unconstitutional because it treated married and unmarried individuals differently. The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.

In addition to the resemblance between Hardwick's conduct and the intimate association of marriage, we pay

heed to the fact that he plans to carry out his sexual activity in private. The right to privacy extends to some activities that would not normally merit constitutional protection simply because those activities take on added significance under certain limited circumstances. In particular, the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home. *Payton v. New York,* 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980).

In *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), police officers executing a valid search warrant found some obscene films in Stanley's home and he was charged with possession of obscene material. The Supreme Court ruled that a state could not make the private possession of obscene material a crime. Although a state may regulate obscenity when such material is distributed or displayed in public, it may not prohibit strictly private uses of obscenity: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home . . . . Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley's First Amendment interests, while not sufficient to allow the viewing of obscene material in public, prevented the State from deciding what he could view in private. Thus, the element of privacy deepened Stanley's interests and limited the possible purposes of state regulation. *See also Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality) (city may not prohibit family members from living together; Justice Stevens concurs on ground that ordinance directed

at internal composition of home lies beyond city's zoning power).

This case presents a person asserting an interest at least as substantial as the one in *Stanley v. Georgia.* In both cases, the fact that the activity is carried out in seclusion bolsters its significance. This is not a case involving sexual activity with children or with persons who are coerced either through physical force or commercial inducement. The absence of any such public ramifications in this case plays a prominent part in our consideration of Hardwick's legal claim.

In sum, the Supreme Court's analysis of the right to privacy in *Griswold v. Connecticut, supra, Eisenstadt v. Baird, supra,* and *Stanley v. Georgia, supra,* leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 486-94, 85 S.Ct. 1678, 1682-87, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring), and the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. *Roe v. Wade,* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973). We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest.

REVERSED and REMANDED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that Hardwick has standing to challenge the constitutionality of the Georgia sodomy statute, but that the Does lack standing. I therefore concur in Part I of the majority opinion.

I must dissent from Part II of the majority opinion, however, because I believe that neither the court below nor this court has the authority to reach and decide the merits of Hardwick's constitutional claims.[1] The United States Supreme Court, in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute nearly identical to Georgia's.[2] I find unpersuasive

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1. For this reason, I would not address the constitutional issues discussed in Part III of the majority opinion. If I thought that this court were empowered to reach those issues, however, I would agree with the majority that the Georgia sodomy statute should be tested under the "compelling interest" analysis set out in *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

2. The Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984), provides, in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years. . . .

The Virginia statute at issue in *Doe v. Commonwealth's Attorney*, Va.Code § 18.1-212 (1950), provided, in pertinent part:

> Crimes against nature.—If any person shall . . . carnally know any male or female person by the anus

(Continued on following page)

the arguments advanced by the majority for declining to follow *Doe v Commonwealth's Attorney.* Therefore, I would affirm the district court's dismissal of Hardwick's complaint for failure to state a claim upon which relief could be granted.

I.

As the majority acknowledges, a summary affirmance by the Supreme Court has binding precedential effect. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Nevertheless, the majority holds that *Doe v. Commonwealth's Attorney* is not entitled to precedential weight because the summary affirmance might have been based on lack of standing, rather than on the merits of the constitutional issues involved.

Contrary to the majority's suggestion, we are not free to speculate that the summary affirmance in *Doe v. Commonwealth's Attorney* might have been based on lack of standing. First, the Supreme Court's discussion of summary affirmances in *Hicks v. Miranda* forecloses such speculation:

> As Mr. Justice Brennan once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes *on the merits of a case . . .," Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959) . . . .

(Continued from previous page)

or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

Id. at 344, 95 S.Ct. at 2289 (emphasis added); *see also* 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 400.05-1, at 4-25 (2d ed. 1982) ("[S]ummary affirmances of lower federal court judgments . . . are decisions *on the merits,* and are binding on lower courts, in spite of the fact that such dispositions are made on the basis of the appellant's jurisdictional statement and the appellee's motion to dismiss or affirm, without oral argument or full briefs on the merits." (emphasis added)); C. Wright, Law of Federal Courts 757-58 (4th ed. 1983) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition *on the merits.*" (emphasis added; footnote omitted)).

Second, the jurisdictional statement in *Doe v. Commonwealth's Attorney* mentioned the substantive constitutional issues involved in the case, but did not mention the issue of standing.[3] The Supreme Court has held that the jurisdictional statement limits the range of permissible lower court interpretations of a summary disposition. *See McCarthy v. Philadelphia Civil Service Comm'n,* 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976); *Colorado Springs Amusements, Ltd. v. Rizzo,* 428 U.S. 913, 920 n. 6, 96 S.Ct. 3228, 3232 n. 6, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting from denial of certiorari).

Third, and most conclusively, if the Supreme Court had decided that the plaintiffs in *Doe v. Commonwealth's*

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3. Nor did the opinion of the three-judge district court mention the issue of standing. The opinion clearly reveals that the district court decided the case on the merits. *See Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199, 1200-03 (E.D.Va.1975).

Attorney lacked standing, the Court *would not have had jurisdiction to decide the case.* Therefore, the Court would have had to *dismiss the appeal,* instead of summarily affirming the judgment of the court below.[4] This would be the necessary result whether the lack of standing was the result of Article III case-or-controversy considerations,[5] or of purely prudential concerns.[6] In my view, the majority fails to address adequately this crucial distinction.

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4. It must be remembered that the judgment of the district court in *Doe v. Commonwealth's Attorney,* which is what the Supreme Court summarily affirmed, was a judgment *on the merits. See supra* note 3.

   The majority cites *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), and *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), for the proposition that the Supreme Court does not always vacate the judgment below and remand for dismissal when the Court finds that the plaintiffs lacked standing. I do not quarrel with the majority's proposition. The crucial issue, however, is whether the Court could have summarily affirmed, on the basis of lack of standing, the lower court's decision in *Doe v. Commonwealth's Attorney,* or whether dismissal of the appeal would have been the required course. In *Rizzo* and *O'Shea,* the Supreme Court *reversed* a lower court decision rendered on the merits in favor of the *plaintiffs.* Other than the majority's interpretation of *Doe v. Commonwealth's Attorney,* it has failed to cite a single instance in which the Court has *affirmed,* on the basis of lack of standing, a lower court decision rendered on the merits in favor of the *defendants.*

5. *See Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, *determining the power of the court to entertain the suit.*" emphasis added)).

6. *See, e.g., Poe v. Ullman,* 367 U.S. 497, 509, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961) (dismissing appeal because of prudential, rather than Article III, standing considerations).

I thus disagree with the majority's conclusion that the Supreme Court in *Doe v. Commonwealth's Attorney* might not have reached the merits of the case. Like all summary affirmances, *Doe v. Commonwealth's Attorney* constitutes a decision on the merits, and, in the words of the Supreme Court, "the lower courts are bound by summary decisions 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. at 345-46, 95 S.Ct. at 2289 (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096, 94 S.Ct. 732, 38 L.Ed.2d 555 (1973)).

II.

The majority also holds that, even if *Doe v. Commonwealth's Attorney* had binding precedential effect when it was decided, such effect has been undermined by recent doctrinal developments. In particular, the majority argues that two footnotes in *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), and the dismissal of the writ of certiorari in *New York v. Uplinger*, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984), indicate that the Supreme Court is now willing to reverse or reconsider *Doe v. Commonwealth's Attorney*. I respectfully disagree.

In footnotes 5 and 17 in *Carey* the Supreme Court noted that "the Court has not definitively answered the difficult question whether and to what extent the constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey*, 431 U.S. at 688 n. 5, 97 S.Ct. at 2018 n. 5; *id.* at 694 n. 17, 97 S.Ct. at 2021 n. 17. I do not read this statement as a retreat from *Doe v. Commonwealth's Attorney*. On its face, the statement

simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct.[7] The statement does *not* purport to overrule those cases such as *Doe v. Commonwealth's Attorney* in which the Court *has* passed on the validity of other such state statutes.[8]

It is clear from the context in which footnotes 5 and 17 appear in the *Carey* opinion that the majority's interpretation of those footnotes is erroneous. The plaintiffs in *Carey* argued that a New York law regulating the sale and distribution of contraceptives violated their right of privacy because the law infringed on their right to engage in "private consensual sexual behavior." The Supreme Court decided the case instead on a more narrow ground, however, and footnotes 5 and 17 constitute the Court's explanation for declining to adopt the plaintiffs' broad right of privacy argument. In effect, the Court was saying, "we have not extended the right of privacy as far as the plaintiffs would like." The Court was *not* saying, "it is now an open question whether the right of privacy in-

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7. For example, the Court has not yet passed on the question whether the right of privacy invalidates state statutes prohibiting fornication. *See, e.g.*, O.C.G.A. § 16-6-18 (1984) (Georgia fornication statute).

8. *See Carey v. Population Services Int'l*, 431 U.S. at 718 n. 2, 97 S.Ct. at 2033 n. 2 (Rehnquist, J., dissenting) ("While we have not ruled on *every* conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting *certain* consensual acts has been 'definitively' established." (emphasis added)). Contrary to the majority's view, Justice Rehnquist did *not* consider footnotes 5 and 17 in *Carey* to be in conflict with *Doe v. Commonwealth's Attorney*. Rather, he indicated that footnotes 5 and 17 can, and should, be interpreted *consistently* with *Doe v. Commonwealth's Attorney*.

validates all state statutes regulating any kind of private sexual conduct."

The dismissal of the writ of certiorari in *New York v. Uplinger* is an even less compelling reason for refusing to follow *Doe v. Commonwealth's Attorney.* In *Uplinger* the Court faced a constitutional challenge not to the New York sodomy statute, but to a statute that prohibited loitering in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." N.Y. Penal Law § 240.35-3. The New York Court of Appeals struck down the statute. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983). The Supreme Court granted certiorari, — U.S. —, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983), but in a subsequent *per curiam* opinion dismissed the writ of certiorari as improvidently granted, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984).

The majority recognizes that a dismissal of certiorari, like a grant or denial of certiorari, normally has no precedential effect whatsoever.[9] Yet it construes the *per curiam* opinion accompanying the dismissal of certiorari in *Uplinger* as a "signal" from the Supreme Court that *Doe v. Commonwealth's Attorney* is no longer good law. This conclusion is based on the statement in the opinion that the case "provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties."

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9. All that can be said with certainty about *Uplinger* is that at least four Justices originally voted to hear the case, and that five Justices subsequently voted not to hear it. *See id.* at —, 104 S.Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari).

Uplinger, — U.S. at —, 104 S.Ct. at 2334. From this single ambiguous statement, the majority infers (1) that the "important constitutional issues" included whether the right of privacy requires invalidation of all state sodomy laws,[10] and (2) that the Supreme Court intended to reverse or reconsider *Doe v. Commonwealth's Attorney*, but decided to wait for another case to do so.[11] These are inferential leaps greater than I am willing or able to make.

Furthermore, even if the majority's inferences are correct, this would not mean that the lower courts are now free to ignore *Doe v. Commonwealth's Attorney*. That the Supreme Court ultimately found *Uplinger* an "inappro-

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10. The plaintiffs in *Uplinger* raised vagueness, overbreadth, First Amendment, equal protection, and due process challenges to the New York statute. *See id.* at —, 104 S.Ct. at 2333. The *per curiam* opinion dismissing the writ of certiorari did not identify which of these constitutional issues the Supreme Court felt were "important." Furthermore, as the majority notes, the Court was not even certain as to just what federal constitutional issues actually had been decided by the state court. Therefore, unlike the majority, I cannot conclude that the "important constitutional issues" referred to by the Court included the right of privacy and its effect on state sodomy laws.

11. As the majority acknowledges, if *Doe v. Commonwealth's Attorney* indeed was a decision on the merits, then we are bound by that decision until the Supreme Court indicates a "willingness to reverse or reconsider" the case. I find highly questionable any inference that the Supreme Court originally viewed *Uplinger* as an appropriate vehicle for reversing or reconsidering *Doe v. Commonwealth's Attorney*. Three of the four Justices who dissented from the dismissal of the writ in *Uplinger* (and who presumably were among those originally voting to hear the case) were in the majority in *Doe v. Commonwealth's Attorney*, and two of the four dissented in *Carey v. Population Services Int'l. See Uplinger*, — U.S. at —, 104 S.Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari).

priate vehicle for resolving" whatever constitutional issues the case presented does *not* imply that those issues previously were unresolved. Nor may *this* court reconsider the wisdom of *Doe v. Commonwealth's Attorney* simply because the Supreme Court may have indicated a possible willingness to do so. As the Supreme Court recently noted, "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983); *see also Jaffree v. Wallace*, 705 F.2d 1526, 1532-33 (11th Cir. 1983), *appeal filed on other grounds*, 52 U.S.L.W. 3441 (U.S. Nov. 14, 1983) (No. 83-812), 52 U.S.L.W. 3473 (U.S. Dec. 3, 1983) (No. 83-929), *probable jurisdiction noted*, — U.S. —, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).[12]

III.

Whatever our personal views about the constitutionality of a law that permits the state to regulate the most private of human behavior within the confines of the home, unless and until the Supreme Court clearly indicates otherwise, we are bound by that Court's decision in *Doe v. Commonwealth's Attorney*. Respectfully, therefore, I dissent.

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12. Nor can the majority rely on the Supreme Court's recent affirmance by an equally divided vote in *Board of Educ. v. National Gay Task Force*, — U.S. —, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985). Affirmances by an equally divided vote are entitled to no precedential weight. *Neil v. Biggers*, 409 U.S. 188, 191-92, 93 S.Ct. 375, 378-79, 34 L.Ed.2d 401 (1972); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264, 80 S.Ct. 1463, 1464, 4 L.Ed.2d 1708 (1960). Furthermore, the Tenth Circuit had held that the right of privacy was *not* implicated by the Oklahoma statute involved in the case. *See National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir.1984).

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8378

D.C. Docket No. 83-273

MICHAEL HARDWICK, ET AL.,

Plaintiffs-Appellants,

versus

MICHAEL BOWERS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

KRAVITCH, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: May 21, 1985

For the Court: Spencer D. Mercer, Clerk

/s/ By: Warren A. Godfrey,
Deputy Clerk

ISSUED AS MANDATE:

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8378

MICHAEL HARDWICK, et al.,

Plaintiffs-Appellants,

versus

MICHAEL BOWERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed June 13, 1985)
(Opinion May 21, 11 Cir., 1985, — F.2d—).
(June 13, 1985)

Before KRAVITCH and JOHNSON, Circuit Judges and TUTTLE, Senior Circuit Judge

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

REHG-6
(Rev. 6/82)